United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1168

BRIEF FOR RESPONDENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION
PRODUCERS & DISTRIBUTORS, NO. 74-1168
WESTINGHOUSE BROADCASTING COMPANY, INC., NO. 74-1283
WARNER BROS., and COLUMBIA PICTURES
INDUSTRIES, INC., NO. 74-1348
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE
UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
COLUMBIA BROADCASTING SYSTEM, INC.,
TIME-LIFE FILMS, INC.,
COLUMBIA PICTURES INDUSTRIES, INC.,
WARNER BROS., INC.,
MCA, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION
PRODUCERS AND DISTRIBUTORS,
Intervenors.

ON REVIEW FROM THE
FEDERAL COMMUNICATIONS COMMISSION

UNITED STATES COURT OF APPEALS
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Intervenors.

ON REVIEW FROM THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the Commission acted reasonably when after some experience with the operation of the Prime Time Access Rule, it modified some of the Rule's restraints but refused to repeal it.

2. Whether the Rule modifications and the refusal to repeal the Rule in its entirety violate the First Amendment or Section 326 of the Communications Act.

3. Whether the eight months notice given by the Commission as to the effective date of the Rule modifications was adequate, and whether the Commission deprived Westinghouse of its right to participate meaningfully in the rulemaking proceeding.

COUNTERSTATEMENT

Petitioners NAITPD, No. 74-1168, and Westinghouse, No. 74-1283, seek review of the Federal Communications Commission's Report and Order, JA. 51-179, to the extent that it modified the prime time access rule, 47 C.F.R. 73.658(k). On the other hand, Petitioners Warner Bros. and Columbia Pictures, No. 74-1348, had requested Commission repeal of the rule, and now request that "the rule be set aside in its entirety" by this Court. Jurisdiction is based upon 47 U.S.C. 402(a), and 28 U.S.C. 2342.

1. Background: The Original Access Rule.

A history of the lengthy proceedings leading to the adoption of the original access rule was set forth in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 473-476 (2d Cir. 1971). In that opinion this Court upheld the access rule, and the related financial interest and syndication rules. Briefly summarized, the original access rule was first adopted on May 4, 1970, 23 FCC 2d 382, 402, and affirmed with modifications on reconsideration, 25 FCC 2d 318, 337, after the Commission in a lengthy proceeding had found that the three networks exclusively controlled "access to the crucial prime time evening television schedule" and there was lacking an opportunity for the competitive development of non-network sources of television programs. 23 FCC 2d at 394, 397. By

prohibiting network and, off-network[1/] programs during a portion of prime time, the Commission was attempting to assist the development of program sources independent of the three major networks as a means of bringing about a greater "diversity of program ideas," 23 FCC 2d at 395 and 37 FCC 2d at 909, in furtherance of "the public interest in diverse broadcast service." 23 FCC 2d at 397. Under the original access rules, the Commission provided that stations in the top 50 television markets could not carry more than three hours of network programs during each evening's prime time (7 - 11 p.m. generally; 6 - 10 p.m. central and mountain time zones). In fact, the Commission was setting aside a new half-hour of prime time for non-network programs on network affiliated stations:

> [W]e have decided first to open access directly to the top 50 markets for independent programming by prohibiting network affiliates in these markets where there are at least three commercial television stations from taking more than 3 hours of network programs between 7:00 p.m. - 11:00 p.m. . . . . In view of the common practice of the networks of offering only 3-1/2 hours of network programs between 7:00 p.m. - 11:00 p.m. the rule we are adopting will open up one half hour of additional time per evening for non-network programs

1/ "Off network" refers to programs which have previously been broadcast on the networks, even though not produced or owned by the networks.

on affiliated stations. 23 FCC 2d 382, 395 (1970), quoted in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d at 476.

This Court rejected the argument that the Commission had thereby imposed an unconstitutional First Amendment restraint "on the network distributors whose products are barred for a half-hour period, on the licensees, whose freedom of choice is restricted, and on the viewer, who is denied access to programming he might have preferred." 442 F.2d at 476.

Both the Commission and this Court recognized that the rule should be tested by "experience under competitive conditions," so that it could be determined whether the diversity and lessening of network control which the Commission was trying to encourage would in fact materialize under the aegis of the prime time rule. 23 FCC 2d at 396 and 442 F.2d at 483, n. 42. The Commission expressed its "intention to follow developments and take any remedial action that may be necessary," 23 FCC 2d at 401.

2. Multiple Waiver Requests Of The Rule.

After the access rule went into effect the Commission had to consider numerous requests for waiver of the rule. Waivers have been granted for:

(a) Individual network news and public affairs programs not part of a regular series.

(b) Evening network news where stations also broadcast an hour long news or public affairs programs.[2/]

(c) "Sports runover" into prime time, for example, golf matches, baseball games.

(d) Presentation of network and off-network children's specials.

(e) And, most controversial of all, waivers for off-network series such as Time-Life's the Six Wives of Henry VIII, and America series. 3/ (See JA 63-66.)

3. Proposed Repeal Or Changes Of Rule.

On October 30, 1972, after receiving petitions seeking repeal of the rule, the Commission issued a Notice of Inquiry and Notice of Proposed Rule Making,

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2/ It was recognized that compliance with the rule "could be achieved by presenting first a half-hour of local news, then the network news before prime time (at 6:30 E.T.), and then another half-hour of local news at 7; but there seemed no reason to force stations arbitrarily to this 'bracketing' format, so that they should be permitted to present the network news at 7 under these conditions, if desired, without its counting against the permissible three hours of network prime-time programming." (J.A. 64).

3/ Review pending National Association of Independent Television Producers v. FCC, D.C. Cir., No. 73-2052.

37 FCC 2d 900 (J.A. 1-33). It announced a further re-exploration of the problem in light of the limited experience under the original rule. Among the wide number of subjects specified with a view towards rule-making were the following (J.A. 25):

> "(b) To what extent in practice as well as in theory--the rule promotes real diversity in program sources, program ideas, and programming itself . . .
>
> "(g) Continuation of waiver . . . for "one time" network news or public affairs programs, or documentaries, or a more general exemption of this type of network material.
>
> "(h) Repeal of the Rule."

Extensive written comments were filed with the Commission by more than 40 parties, many urging repeal, see J.A. 66, Para. 26. Two full days of oral argument were held before the Commission in July, 1973, and numerous parties participated. (See JA 44-46.)

On November 29, 1973, the Commission by Public Notice (J.A. 47) announced that it had decided upon certain specified changes which were later formally adopted by the Commission in a Report and Order released on February 6, 1974 (J.A. 48-179).

4. Commission Modification Of The Rule.

In terms of the diversity of programs shown during access time the record before the Commission was not such as to justify the continuation of the prohibition, seven nights a week on network and off-network programming (J. A. 111, 113, 120, Paras. 79, 82, 91-92). Moreover, the Commission concluded that some relaxation of the current restrictions on network and off-network programs would obviate the necessity to consider further waivers for particular programs (J.A. 126, n. 43). As previously indicated, the Commission had experienced a burdensome number of waiver requests under the rule, and requested waivers for particular off-network programs had been especially troublesome because they got the Commission into evaluating "program quality" (J.A. 115, Para. 84).

However, as it had promised to do from the outset of this proceeding, (J.A. 6-7) the Commission recognized the fact that the rule had a short history and did not repeal the rule or relax its provisions to the extent it might otherwise have done. It expressed the view that the rule had not yet had

> a fair test . . . at least in the sense that the somewhat mediocre showing so far can be regarded as showing that nothing different is to be expected in the future . . . [T]his is one of our chief reasons for not moving further at this time in the direction of either repeal or of opening up more prime time (particularly former network time) to network programming and to those producers who prefer the network route (J.A. 118-119, Para. 89).

These competing considerations were resolved by the Commission with a decision in which the following basic changes of relevance to this case were made in the rule to become effective at the beginning of the fall 1974-75 season:

(1) Removal of the Sunday prohibition of network and off-network programming during access time.

(2) On Monday through Saturday nights, the access period was specified for a particular one half hour period, 7:30 - 8:00 E.T. and P.T. (6:30 - 7:00 C.T. and M.T.).

(3) One of these six half hour periods, Monday through Saturday, may be filled with network or off-network material which consists of children's specials, or documentary, or public-affairs programs.

(4) Feature films which previously could be broadcast during the access period, if they had not been

broadcast in the market within two years, were now prohibited during the six access periods. (JA 110-111, 135-136.)

Although not specified in the rule, the Commission stated in the Report and Order its expectation that a station would devote an appropriate portion of access time, or at least of total prime time, to material designed for children or of particular significance to minority groups or particularly directed to needs and problems of the station's community or coverage area as disclosed in its regular efforts to ascertain community needs (J.A. 118, Para. 88.)

5. Reasons for Modifications

Changes in the Rule were largely designed to minimize the necessity for individual adjudications for waiver requests in the following manner:

Since Sunday no longer falls within the rules, and one of the six prime time access periods may be utilized for children's specials, public affairs or documentary programs, individual waivers will normally be unnecessary.

Regarding the general waiver for regular network news and public affairs programs, the Commission noted:

> The "network news" waiver arrangement has worked reasonably well so far, but we are faced with increasing demands for its relaxation, including . . . requests for waiver in connection with ABC's Reasoner Report program (to permit it to be carried

> after 7 on Saturday or Sunday), requests to carry network news at 7 on Saturday or Sunday when a sports event preempts the station's usual hour for network news, and a request in comments herein (which might have public interest benefits) to permit network news at 7 in markets where there is now none (without a preceding full local hour). The possibility of increasing network news time from its present half-hour has also been mentioned, a development which might well be in the public interest. These are not insoluble or terribly difficult questions, but they would require some careful adjustments; and in view of the very little benefit accruing from this period to the cause of promoting really new non-network programming, we conclude that the need for such "fine tuning" should be dispensed with. (J.A. 112, Para. 80).

By lifting the previous restriction on use of the first half hour of prime time, the Commission eliminated the necessity for such requests.

Regarding "sports runovers", the Commission noted:

> Since the 7 - 7:30 p.m. period is no longer subject to restrictions, this becomes less of a problem. However, if the objectives of the rule are to be properly served, we also believe it desirable to insure a higher degree of protection from impingement for the remaining portion of "cleared" time, the 7:30 - 8 p.m. E.T. period, than that which has prevailed up to now for the preceding half-hour. Accordingly, . . . sports runovers of late afternoon games will not be considered "network programming" if the game was scheduled so that in its normal course the telecast (including post-game shows, if any) would have been over by 7 p.m. E.T. (J.A. 126).

By permitting use of prime time for "children's specials", the new rules facilitate early evening viewing times for such programs. Indeed for the last year:

> . . . one of the most common complaints from viewers (including parents, educators, and children themselves) is that desirable and well-received children's "specials" such as Cinderella, The Grinch that Stole Christmas and the Charlie Brown programs, may start on the network only at 8 p.m. in the normal course of programming, and this makes them too late for children's viewing if they are to observe a reasonable bedtime hour. Therefore, it is desirable in the public interest to facilitate the showing of such material earlier, if this is what stations choose to do. (J.A. 114).

Finally, the permissive option to use one of the six access periods would

> . . . make easier certain other kinds of documentary material which is otherwise difficult under the rule, for example . . . factual network documentaries . . ., and off-network material, particularly that which is an hour long, such as the National Geographic and [Time-Life's] America series. In various "off-network" waiver actions we have found such presentation to be in the public interest; but we agree with Westinghouse, NAITP and other proponents of the rule that this process is an undesirable one, getting the Commission, at least to some extent, into the evaluation of "program quality" with respect to individual material, and creating uncertainty on the part of independent producers.... (JA 115.)

A motion for stay was denied by the Commission (J.A. 180-183), and by this Court on March 12, 1974, which ordered expedited briefing and argument.

ARGUMENT

Petitioners, NAITPD and Westinghouse assert that the Commission should not have modified the access rule. Petitioners Warner Bros. and Columbia Pictures just as vehemently assert that the rule should have been repealed in its entirety. It is not necessary to discuss the principles which govern judicial review of FCC rule-making decisions because they have been more than adequately articulated in Mt. Mansfield and numerous other decisions of this Court cited in that decision, 442 F.2d at 481-482.

When the original access rule was first adopted, both the Commission and this Court recognized that they were dealing with "estimates and forecasts". Therefore, the matter could not be determined with "absolute certainty short of some operational experience under competitive conditions." Mt. Mansfield, 442 F.2d at 483, n. 42. The rule went into effect in 1970, and was affirmed by this Court in 1971. Thereafter, the Commission was faced with numerous requests for waiver of the rule which it was obliged to consider, not only by its rules

of practice and procedure but also by judicial precedent.

On October 30, 1972, a rulemaking proceeding was instituted, 37 FCC 2d 900, to consider whether the rule should be repealed or modified, J.A. 1-33. After extensive written comments and two days of oral argument the Commission concluded that the information before it indicated that the diversified programming the rule was designed to encourage had not yet emerged. However, because the rule had not had an adequate test period the Commission refused to repeal the rule in its entirety and in a legitimate attempt to reconcile the conflicting interests, the Commission modified the rule. See Argument I below.

Aside from the administrative convenience of not having to face numerous waiver requests, the rule changes will benefit independent producers by insuring a stable market--the 7:30 - 8 p.m. time slot--for their products. Thus the Commission observed "We have done this in the interest of certainty and stability--letting networks and stations know what time will or will not be available for general use . . . and giving independent producers a specific time-period, and therefore a particular composition of audience to aim at." (J.A. 116). Moreover,

licensees will also benefit from the certainty under the modified rule as well as the flexibility added by elimination of the 7 - 7:30 restrictions; the exemption for Sunday night family entertainment; and the once a week permissive exemption for children's specials, documentaries, or public affairs programming. These changes afford "leeway to permit stations to use such material if they choose to do so," without getting the Commission into considering individual waiver requests.

Despite a thorough Report and Order, J.A. 51-167 of more than 100 pages, Petitioners insist that the Commission did not adequately explain its decision. Here as in Mt. Mansfield, all petitioners insist that their conflicting economic interests are absolutely protected by the First Amendment and Section 326. Again as in Mt. Mansfield some of the petitioners make procedural attacks on the rulemaking proceeding. We will demonstrate below that there is no substance to these arguments.

I. AFTER EXTENSIVE RULEMAKING PROCEEDINGS GROUNDED ON ACTUAL EXPERIENCE WITH THE OPERATION OF THE ACCESS RULE, THE COMMISSION REASONABLY CONCLUDED THAT SOME MODIFICATION OF THE RULE WAS NECESSARY, BUT THAT ITS REPEAL AT THIS TIME WAS NOT APPROPRIATE.

(a) Findings Regarding Lack Of Diversity Of Programs.

It was the Commission's hope when it adopted the rule in 1970, "that diversity of program ideas [would] be encouraged by removing the three-network funnel for this half hour of programming." 23 FCC 2d at 395. By giving producers the opportunity to develop "their full economic and creative potential," the Commission was attempting to serve "the public interest in diverse broadcast service," 23 FCC 2d at 397, recognizing that "diversity of programs . . . are essential to the broadcast licensee's discharge of his duty as trustee for the public in the operation of his channel." 23 FCC 2d at 400.

Perhaps the most telling admission of the rule's failure to achieve the hoped for diversity came when Petitioner Westinghouse's principal officer candidly admitted to the Commission at oral argument in the present proceeding that the rule had not led to more program diversity and "that is one of the great jeopardies I think the rule has at this moment." (Tr. 486).

Specific data upon which the Commission relied in concluding that the anticipated diversity of programs has not materialized under the rule included the following:

(1) A marked increase since the rule's adoption in the "stripping" of programs on weeknights from 7:30 - 8:00 p.m. Stripping is the practice of showing multiple episodes of the same program in the same week and game shows appear peculiarly susceptible to this practice. The Commission found that in 1970 before the rule 7:30 - 8:00 p.m. was filled with all network programs (except for a few isolated preemptions) and was thus different programming, whereas in 1973 after the rule 34 stations showed game shows, usually five nights a week.[4/] (J.A. 120, 147).

4/ The proliferation of game shows during access time is relevant to a discussion of the necessity for an access rule in its present form, not because of any supposed dislike the Commission has for game shows, but because they are susceptible to stripping and sometimes represent "sixth episodes" of shows shown five days a week during the daytime. (J.A. 120). The more stripped or "sixth episode" game shows are shown during the access period, the less successful the rule is going to be in terms of its objective to bring about a diversity of programs. Moreover, stripped game shows were in existence and competing with network related programs before the access rule, (J.A. 111, 146) and thus were not the "high cost, prime time, syndicated programming" which had "virtually disappeared," 23 FCC 2d at 385, 394, and thus needed the encouragement of the access rule. (J.A. 111).

(2) During the 7:00 - 7:30 period on weeknights, the number of stations on which game shows were shown usually five nights a week arose from 20 before the rule to 56 in 1973 after the rule. (J.A. 111, 120, 146).

(3) During the 7:00 - 7:30 period, weeknights in 1973 only one station in the top ten markets and only about 10% of the stations covered by the rule presented "a different access-period program each night." (J.A. 111).

(b) Factors Militating Against Total Repeal.

Although the record of performance under the rule in terms of the lack of emergence of diversified programming which the rule was intended to encourage, viewed in the abstract, could logically have justified an agency decision to relax the rule to a greater extent than it did, (J.A. 113, 118-119) the Commission found that there were countervailing considerations against total repeal. The rule was "relatively new," it does take time to overcome the historic preference for the "tried and true" and some uncertainty discouraging costly investment in novel programs has existed. (J.A. 118-119).

Thus the agency was faced with the possibility of improved performance in the future, and the present reality of a deteriorating diversity in programming

during the access period. Contrary to Warner Bros.' position an agency faced with such a dilemma should not be deprived of the discretion to take some remedial steps to attempt to improve the immediate situation while at the same time allowing for the possibility that high cost diversified programming on a scale sufficient to justify the restraint imposed by the access rule might materialize. We submit that the Commission's action in this case was a proper exercise of such discretion.

It is mere speculation to argue as does Warner Bros. that the rule, still in its infancy, has made the networks even more powerful and dominant "in view of the strong degree of dominance inherent in the networks' position, as long as they are three sellers on the one hand, as against hundreds of potential national advertiser customers, and three buyers on the other hand facing more than 100 producer-sellers." See Commission Report and Order, (J.A. 123).

But the rule was primarily aimed at opening up time to independent producers so that the public would receive the benefits of new and different programming. In this respect it is clear that the Commission's actions have in fact, lessened the networks' dominance. While

"[i]t is true that the role of [network] owned stations in the success of access-period material is considerable, . . . this appears to be somewhat less true now, when these stations are buying somewhat less as a group." (J.A. 123). And the limited period in which the rule has been in effect has not been sufficient to really determine its ultimate value. In the first year of its existence off-network and all feature film could be used during the access period. Moreover there is an obvious historic tendency for stations to broadcast proven successes. Perhaps of even greater significance was the fact that a climate unfavorable to the rule's goal existed due to the uncertainty of the rule's tenure. This would obviously tend to discourage significant investments by producers in programming and stations from taking the time to build an audience for the new programming. Thus, the Commission concluded that it is much too early to state conclusively that the rule will fail and accordingly should be repealed. See Report and Order, JA 118 - 120.

C. Commission's Reconciliation of Conflicting Interests

Petitioners construe the Commission's characterization of its decision as a compromise and "representing an adjustment of competing demands" as an abdication of the Commission's public interest responsibility. However, this Court has previously indicated that the Commission should not be faulted "for believing a compromise between . . . competing claims constitutes the best solution." WBEN, Inc. v. United States, 396 F.2d 601, 614 (2d Cir.), cert. denied, 393 U.S. 914 (1968).5/

The concurring opinions of then Chairman Burch, now Chairman Wiley and Commissioner Reid indicate that one of the considerations which led them to accept this decision, thus giving it majority support was that it was the one decision capable of achieving majority support within the Commission. The propriety of a vote cast with these considerations in mind was upheld in Greater Boston Television Corporation v. FCC, 444 F.2d 841 (D.C. Cir.), cert. denied, 403 U.S. 923 (1971) because:

5/ Other cases in which this Court has approved "middle ground" Commission decisions are GTE Service Corporation v. FCC, 474 F.2d 724, 729 (2d Cir. 1973) and Gross v. FCC, 480 F.2d 1288, 1290 (2d Cir. 1973) (compromise between total prohibition of third party traffic on amateur radio and total allowance of such traffic).

> Government often involves the choice of the feasible, and the selection of the least undesirable alternative. It is accepted judicial practice for a judge to cast a vote, at least assuming no violation of conscience is involved, in order to avoid an impasse and secure a legally effective mandate for the court." 444 F.2d at 861. (Citations omitted.)

Among the specific benefits to the public which the Commission had in mind in modifying the rule are the following:

(1) A greater opportunity for the public on Sunday evenings, "traditionally a popular family entertainment network period," to view network programming. (JA 111.) In this regard, NBC has announced that its Wonderful World of Walt Disney program will be changed from a 7:30 p.m. Sunday starting time to one of 7:00 p.m.

(2) A greater opportunity for early-evening presentation of network children's "specials." The Commission noted that, because of the 8:00 p.m. starting time for network programming, "one of the most common complaints from parents, educators and children" was that "children's 'specials' . . . are shown too late for children's viewing if they are to observe a reasonable bedtime hour." (JA 114-115.)

(3) A greater opportunity for prime-time public affairs programs and related documentaries. The rule as originally written did not make any easier the presentation of these programs whose appearance in prime time has declined. During argument, the Commission learned from NBC that the facts of economic life were such that there would be less of these programs if they had to be charged against the current network portion of prime time.6/ (Tr. 380.) Relatively few of these expensive and not commercially lucrative programs have emerged so far from non-network sources. (J.A. 115.) Since the Commission's action, NBC has announced plans to televise a news documentary next fall on Saturdays, from 7:00 to 8:00 p.m.

6/ Significantly the principal officer of Westinghouse acknowledged that, according to previous experience, documentaries are not a successful competitor in the ratings against entertainment shows in the heart of prime time. (Tr. 490-491.) ABC indicated that it loses approximately $15 million a year in news and public affairs. (Tr. 361.)

II. THE RULE'S PERMISSIVE EXEMPTION FOR CERTAIN TYPES OF PROGRAMS, AND PROHIBITION OF OTHER TYPES DURING SPECIFIC LIMITED PERIODS, DO NOT VIOLATE THE FIRST AMENDMENT OR SECTION 326 OF THE COMMUNICATIONS ACT.

Petitioners NAITPD, and Westinghouse maintain that the modification of the access rule, and especially the permissive exemption for certain types of programs, violate the First Amendment and Section 326. On the other side, Warner Bros. and Columbia Pictures urge that the refusal to repeal the rule in its entirety, and the barring of feature films from the 7:30 - 8:00 p.m. period Monday through Saturday violates the same basic provisions. We respectfully submit that Mt. Mansfield and other Court decisions establish the validity of the Commission's actions.

The First Amendment considerations which caused this Court to uphold the original rule three years ago are equally applicable to the present attack on the Commission's modification and refusal to repeal the rules. It was the promise of encouraging diversity of programs tnat caused, in part, the access rule to be characterized by this Court as "a reasonable step toward fulfillment of [the First Amendment's] fundamental precepts." 442 F.2d at 477. The hoped for diversity of programs has not yet materialized under the original rule resulting in its modification by the Commission.

Petitioners NAITPD and Westinghouse are wrong in placing the emphasis which they appear to give to the number of program choices available to the licensee for it is the right of the viewers and listeners which is paramount, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969), and the greatest number of producers is of no value to the public unless they in fact produce diverse programs. "Diverse and antagonistic sources" are important to the extent that their presence results in "the widest possible dissemination of information" to the public. Associated Press v. United States, 326 U.S. 1, 20 (1945). Regardless of how many new producers the access rule may have made available, the disappointing fact is that this has not resulted in diversity of program choices to the public.

Mt. Mansfield recognized that when "economic reasons" have led to an unhealthy condition from the standpoint of First Amendment values, the Commission can act. 442 F.2d at 480. Economic considerations have created a situation in which public affairs and educational documentaries have declined during prime time. Additionally "well received" children's specials, when shown, are on too late for children's viewing. (J.A. 114-115).

In attempting to facilitate the showing of these types of programs by recognizing the "special problems" they now face (J.A. 114-115), the Commission has acted in the interest of the "right of the public to be informed," Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 112-113 (1973).

The permissive exemption for children's specials, documentaries, and public affairs programs is not an attempt by the Commission to tell stations what they can or can not broadcast from 7:30 - 8:00 p.m. one night a week. The fact that networks choose to produce these types of programs and their affiliates may decide to broadcast those programs,7/ does not mean that either action is mandated by the Commission.

7/ There is of course, no assurance that affiliates will broadcast this type of programming which is not as financially rewarding as entertainment programming such as game shows. One of the reasons NBC gave for no longer advocating repeal of the access rule was its belief that if the rule were repealed, clearances by affiliates of network programs "may not come forth as readily as they once did . . . . It's like a runaway child. You may get the child back, but the experiences the child has had in the outside world has changed his or her perspective." (Tr. 375).

Far from being a restraint on licensees, the exemption permits them to carry one night a week a network program they otherwise could not carry because of the restraint imposed upon them by the access rule. Nor should the fact that three general categories, and not others, are available for a single half-hour of network showing during the week cause this Court to find a violation of Section 326. This Court has recently rejected an argument that Section 326 was violated by a Commission regulation which permitted amateur radio stations, if they wished to do so, to transmit non-commercial public service communications but did not permit the same stations to transmit business communications. Gross v. FCC, 480 F.2d 1288, 1292 (2d Cir. 1973); see also 47 U.S.C. 303(a)(b); Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278 (2d Cir. 1965).

Finally, Warner Bros. asserts that the ban on feature films is unconstitutional since it arbitrarily singles out feature films for oppressive treatment without justification. Implicit in this argument is the view that the reason for the access rule was to restrict only network involvement in prime time programming. But as was recognized by this Court in Mt. Mansfield:

> The purposes of the prime time access rule justify the off-network and feature film restrictions of that rule. The Commission could properly conclude that "to permit this [use of reruns and film during the freed time period] would destroy the essential purpose of the rule to open the market to first run syndicated programs". 442 F.2d 484 (Emphasis added. Footnote omitted).

After a full reconsideration of the conflicting considerations the Commission concluded that the objectives of the rule could best be accomplished by completely lifting the ban against showing feature films in the 7 to 7:30 segment, and barring it completely at 7:30 - 8:00, Monday through Saturday. This will still enable stations to present a 90-minute movie from 6 - 7:30, during the week, and there is no limitation on Sunday nights. "Stations may, of course, preempt network time later [in the evening], as a number do and long have done. . ." (J.A. 117). And as this Court concluded in Mt. Mansfield this modification of the access rule

> far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts, for it is the stated purpose of that rule to encourage the "[d]iversity of programs and development of diverse and antagonistic sources of program service". 442 F.2d at 477.

III. THE COMMISSION GAVE ADEQUATE NOTICE AS TO THE EFFECTIVE DATE OF THE RULE AND WESTINGHOUSE WAS NOT DEPRIVED OF MEANINGFUL PARTICIPATION IN THE RULEMAKING PROCEEDING.

(a) NAITPD and Time-Life argue that the September 1974 effective date for the rule changes is independently unreasonable. NAITPD asks the Court to require the Commission to provide a more reasonable effective date (NAITPD Brief, p. 100). Time-Life on the other hand asks this Court to write into the rule a September 1975 effective date. (Time Br., p. 6). Their argument is supported by neither the law nor the facts.

The Administrative Procedure Act, 5 U.S.C. 553(d), requires 30 days notice of the effective date of substantive rules. On November 29, 1973, the Commission released a Public Notice, J.A. 47, describing the amendments which would be made in the rule.[8/] Thereafter on January 24, 1974, another Public Notice (J.A. 48-50) was released which specifically stated that the new rule would

8/ NAITPD acknowledged that in "a matter of days" after the Commission's November 29, 1973, Public Notice, stations, advertisers and buyers of syndicated programming were operating on the assumption that the rule changes stated in the November 29 Notice would be effective in September 1974. NAITPD's Petition For Stay, pp. 3-4.

be effective in September 1974. Thus, the Commission gave more than eight months notice, whereas the law only requires 30 days notice.

To the extent that eight months is not sufficient to satisfy NAITPD and Time-Life, the Supreme Court in U.S. v. Midwest Video Corp., 406 U.S. 649, 673-674, n. 31 (1972) quoted with approval the Fifth Circuit's observation that:

> Admittedly the rule here at issue has an effect on activities embarked upon prior to the issuance of the Commission's Final Order and Report. Nonetheless the announcement of a new policy will inevitably have retroactive consequences . . . . The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the Courts have frequently recognized that new rules may abolish or modify pre-existing interests. General Telephone Co. of the Southwest v. U.S., 449 F.2d 846, 863-864 (5th Cir. 1971).

Finally, since the statutory authority invoked by Time-Life, e.g., 5 U.S.C. 706 (2), authorizes this Court only to "hold unlawful and set aside agency action," and says nothing about the power of this Court to substitute its conclusion as to what the effective date should be, we respectfully submit that this Court should decline what amounts to a request from Time-Life for the Court to engage in rulemaking.

(b) Petitioner Westinghouse complains that it was deprived of meaningful participation in this proceeding in that three subjects of the Commission's decision were set forth only in the Notice of Inquiry and not in the Notice of Proposed Rule Making. Westinghouse refers to the Commission's policy statement that local stations should use some of the remaining access time for programming for children or of particular significance to minority groups and/or particularly directed to community needs and problems. (J.A. 118). Its complaint about lack of adequate notice and opportunity to comment on this point is surprising since Westinghouse's principal officer made the following statement at oral argument before the Commission:

> "I really don't find anything inimicable or heretical about the idea of the Commission stating its expectancy as to what ought to be done in this period by local stations and give a variety of alternatives, either mutually exclusive or otherwise, and look at it that way." (Tr. 489).

The inclusion of an exemption for children's specials was designated in the inquiry portion of the Notice. In its Brief, Westinghouse attacks this provision because the presentation of network-program matter in prime time is counter to the original purpose of the access rule to limit network control of prime

time television (Westinghouse Br. 30) and because the exemption constitutes abridgment of First Amendment rights and censorship.

But the first point was in fact advanced by Westinghouse before the Commission in response to the Notice of Proposed Rulemaking's proposal that the Commission adopt a rule exempting network news and public affairs. Westinghouse said:

> [T]he encroachment on station time through broad exemptions such as this would work to frustrate the essential purposes of the rule. For this reason, Group W has consistently opposed any unnecessary expansion of the categories of exempt network programming (Westinghouse Comments of January 15, 1973, p. 22).

The First Amendment and censorship argument was not raised by Westinghouse before the Commission even though the rulemaking portion of the Notice included a proposed rule exempting particular types of programs, e.g., documentaries and public affairs. Under these circumstances it is difficult to see how the failure of the rulemaking part of the Notice to include children's programs among the types of programs for which an exemption was being proposed deprived Westinghouse of its right

to participate meaningfully in the proceeding. Moreover, the lack of an exemption for children's specials would have continued to generate individual waiver requests and adjudications, which both Westinghouse and the Commission agree is an undesireable practice. (JA 114-115.)

Finally, Westinghouse complains about the Commission designation of 7:30 - 8:00 as the specific access time. Practically speaking the Commission was recognizing the existing situation (JA 64). It was also preventing the networks from designating 7:00 - 7:30 as the access period under the revised rule, a period for which they had not generally programmed in the past. As the rule now stands the networks are not likely to program from 7:00 - 7:30 on nights when they cannot program from 7:30 - 8:00. In short, under the modified rule, networks on most nights will be out of prime time for one hour, whereas, if they had not been specifically prohibited from utilizing the 7:30 - 8:00 period they could have been out of prime time for only one half hour.

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed.

Respectfully submitted,

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Federal Communications Commission
Washington, D.C. 20554

April 1, 1974

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[illegible],
Petitioners,

v.

FEDERAL COMMUNICATIONS
COMMISSION and UNITED
STATES OF AMERICA,
Respondents,

No. 74-1169

[illegible],
Petitioners,

v.

FEDERAL COMMUNICATIONS
COMMISSION and UNITED
STATES OF AMERICA,
Respondents,

No. 74-1203

WARNER BROS., INC. and COLUMBIA PICTURES INDUSTRIES, INC., Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, Respondents, HCA, INC., NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS, AMERICAN BROADCASTING COMPANIES, INC., Intervenors.	)	No. 74-1343

CERTIFICATE OF SERVICE

I, Dana S. Crawfield, hereby certify that the foregoing Opposition to Motion for Leave to File Brief Amicus Curiae was served this 1st day of April, 1974, by mailing true copies thereof, postage prepaid, to the following persons at the addresses given below:

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